Docket No. 92-195

IN THE SUPREME COURT

OF THE

UNITED STATES

October, 1992 Term

ARLINGTON RAY ROBBINS
Petitioner

-vs-

JOHN MURPHY
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

In an action brought against local government under the Establishment Clause of the First Amendment of the United States Constitution, does a person have the constitutional right to intervene under the Establishment Clause when it is contended that the remedy being sought by Plaintiff in the action is not required under the Constitution and would in fact be hostile to religious preference of the person seeking to intervene and would cause such person both economic and non-economic injury equal or greater to that claimed by Plaintiff?

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TABLE OF AUTHORITIES

CASELAW:

Actmedia, Inc. v Stroh, 830 F.2d.957, 962 (9th Cir. 1986) . 6

Christian Science Reading Room Jointly Maintained v. City and County of San Francisco, 784 F.2d 1010, 1012 (9th Cir.1986) 6

Lynch v. Donnelly, 465 U.S. 68 (1983) . 17

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (1983) . . 13

STATUTES AND REGULATIONS:

California Civil Code Section 880.340 . . 7

California Civil Code Section 885.030 . . 7

I. SCOPE OF REPLY.

Respondent's Brief In Opposition dated August 27, 1992, ("Respondent's Brief") does not challenge Petitioner's assertion that the Constitutional question raised in the Petition For Writ of Certiorari filed by Petitioner (the "Petition") has never before been considered by the courts. Petitioner believes that the arguments made in Respondent's Brief are adequately addressed for the most part in the Petition. Certain assertions, however, have been made in Respondent's Brief that require a response and further demonstrate the very different perspective of Petitioner from the County in defending against the American Civil Liberties Union ("ACLU") instigated attack on the Helix Cross. Petitioner will confine this Reply to those points.

II. RESPONDENT HAS MISLED THE COURT AS TO THE EXTENT OF PARTICIPATION BY PETITIONER IN THE HELIX CROSS CASE APPEAL

Part IV of the Respondent's Brief filed by the ACLU on behalf of Respondent is very misleading as to the extent of Petitioner participation at the appellate level in the Helix cross case.[1/] Counsel for the ACLU represents that: "Indeed, the only part of the proceedings in which Robbins did not participate was oral argument before the Ninth Circuit." (Respondent's Brief, N 3, Part IV, P 15).

Counsel with the ACLU "overlooks" the comprehensive supplemental briefs that were requested <u>after</u> oral argument

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1/ <u>Murphy v. Bilbray, et al.</u>, D.C. No. 90-134 GT(IEG); Docket No. 92-55093 In the United States Court of Appeals for the Ninth Circuit (hereafter "Ninth Circuit").

by the Ninth Circuit with regard to five substantial issues (see Appendix "K", pp 1a-2a included with this Reply Brief, proceeding seriatum from the appendices A-J in the Petition). Both the County and ACLU filed comprehensive supplemental briefs. The ACLU filed a 15 page, VII part brief dated July 21, 1992, with 33 exhibits attached. The County filed a 14 page, VI part brief dated July 7, 1992. Petitioner was not made aware of this request for supplemental briefs until after they had been filed with the court by the parties. The last sentence of the Ninth Circuit's order makes clear that only briefs of parties were being requested and that briefs from amicus curiae would not be received.

Furthermore, Rule 29 of the Federal Rules of Appellate Procedure provides for only the filing of one brief by Amicus Curiae, and no provision is made for the

filing of even a reply brief. The ACLU's view as stated in N.3, Part IV, P. 15 of Respondent's Brief that there was "ample opportunity [for Petitioner] to participate at the appellate level..." is simply untenable.

III. PETITIONER WOULD HAVE RESPONDED VERY DIFFERENTLY TO THE QUESTIONS RAISED BY THE NINTH CIRCUIT IN ITS REQUEST FOR SUPPLEMENTAL BRIEFS.

The Ninth Circuit panel requested supplemental briefing on five significant points as follows:

> (1) Whether the interests of the grantor's heirs have been adequately considered by the district court.
>
> (2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether, under the facts of this case, conveyance to private parties of all or part of dedicated park land held in trust violates California trust, statutory or constitutional law.

(4) Whether, under the facts of this case, appointment of a successor, non-governmental trustee would be a feasible remedy.

(5) Whether disputed facts remain requiring a trial.

The standard for review on appeal of the district court's decision on constitutionality is de novo. (Actmedia, Inc. v Stroh, 830 F.2d.957, 962(9th Cir. 1986); Christian Science Reading Room Jointly Maintained v. City and County of San Francisco, 784 F.2d 1010, 1012(9th Cir.1986). While Petitioner was permitted full participation by the district court below as amicus curiae --

at the critical de novo appeal level he was summarily relegated at the outset to the limited role of a typical amicus curiae as if making an appearance in the case for the first time.

As a party with full appellate participation rights, Petitioner would have again responded from a very different perspective than the County of San Diego or the ACLU in their supplemental briefs. As an additional example arising out of the supplemental brief of the County, it was asserted at Page 8 that the heirs of the donor "cannot enforce any reversionary claims under the deed because they have failed to record the legally required notice of their reversionary claims as required by California Civil Code Sections 880.340 and 885.030." The County must take this position as a rear guard action to defend against a potential reversion of the

entire park if the memorial cross dedicated to the memory of Mary Carpenter Yawkey is ordered removed. The County is well aware, however, of the constitutional infirmities that the County would face in attempting to apply those code sections in defense against a reversionary claim made by the Yawkey heirs under this 63 year old conditional gift made in trust -- which Petitioner would have pointed out to the Ninth Circuit, had he been permitted to participate.

With regard to points (1), (3) and (4) of the Ninth Circuit's request, had petitioner been permitted to file a supplemental brief in response to the Ninth Circuit's request he would have argued that the County accepted the gift of the existing memorial park in trust,

as the deed so states.[2/] If it were determined that the County could not constitutionally honor the conditions of the deed, then, in the alternative, the County was duty bound to transfer the memorial park and cross, along with the perspective endowment, to a private group that could maintain the personal memorial -- and the court in such event should so order.

Petitioner had actually suggested earlier at the district court level in his opening brief that:

> "If the court...concludes under the prohibitions of the Establishment Clause that the County cannot

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2/ The memorial park was constructed in 1925 with private funds equivalent to approximately $1,200,000.00 in todays dollars along with the existing centerpiece memorial cross erected in memory of Mary Carpenter Yawkey.

maintain the memorial under the terms it was deeded to the County in trust, then amicus curiae will volunteer to create a private trust organization and solicit the necessary additional endowment funding to maintain the park for its original intended purposes, if this court orders the County to surrender the trust corpus as being inconsistent with its governmental functions under the Establishment Clause." [CR-39, at P.17]

The ACLU obviously has no interest in seeing the memorial cross perpetuated by placing the park under a private trust to avoid destruction of the cross -- as it argued to the contrary in its Supplemental Brief. The County Board of Supervisors also has no such interest and did not argue in favor of such a possible solution in their Supplemental

Brief. Their primary responsibility is perceived to be to retain the park in the County's park system for the benefit of their diverse electorate -- even if the memorial cross must be sacrificed toward this end. Such action would be totally contrary to the very spirit and purpose of the original gift made by the Yawkey family in trust to honor their mother, Mary Carpenter Yawkey, including this special memorial monument.

Of the participants in the district court proceedings, only Petitioner was fully motivated to address points (1), (3) and (4) of the Ninth Circuit's request (App. K, P.2) from the perspective of preserving both the park and memorial cross. Petitioner perceives this to be the better alternative to the ordered sacrilegious destruction of this long standing memorial cross should the courts uphold the district court's ruling

that it cannot continue on public land. As quoted above, Petitioner had already suggested that very approach in the district court as an alternative, were the court to conclude that the memorial cross could not continue on public land.

Despite the Ninth Circuit's expressed interest in exploring this very concept, this positive viewpoint regarding the alternative of a private trust has been barred at the appellate level, as Petitioner has no standing to be heard on appeal as a result of the denial of his intervention. This demonstrates yet another practical example of why intervention should have been allowed. It also provides additional focus on the inconsistency of the Ninth Circuit in its intervention rulings, as discussed at Pages 57-60 of the Petition addressing the Ninth Circuit's opinion holding for liberal

intervention in Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525(1983).[3/]

IV. THE QUESTION RAISED IS THE CONSTITUTIONAL RIGHT TO BE HEARD

At Page 11 of Respondents Brief, counsel for the ACLU essentially argues that if ownership and maintenance of the memorial cross violates the constitutional prohibitions, then "it could not be logically argued that the constitutionally-mandated remedy itself

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3/ The judge that wrote the Sagebrush opinion was the lead Judge of the Ninth Circuit panel before whom Petitioner's intervention case was argued (App.C, P.189 of the Petition). The same judge is also on the Ninth Circuit panel reviewing the Helix Cross Case on appeal (Docket No. 92-55093 -- see App.K).

constitutes a violation of the Constitution." This conclusionary argument begs the question. The question to be decided is whether or not the Yawkey memorial cross violates the constitutional prohibitions. Petitioner seeks only to be fairly heard before the appellate courts that will ultimately decide the question de novo. He seeks only to be permitted to participate as he believes is his constitutional right as set forth in his Petition.

If Petitioner's "accommodation" argument were to prevail on appeal, then there simply is no "constitutionally - mandated remedy", (quoting from Respondent's Brief). If the ACLU strict separation viewpoint prevails, then at least constitutional due process will have been served, and the decision will have emanated from full advocacy by all

affected parties coming from very different perspectives.

This type of conclusionary argument by the ACLU stems from an obvious assumption that the strict separationist doctrine is the law of the land at both the California and National level. The ACLU essentially proceeds from a bias that a Christian cross on public land is wrong per se. Petitioner has asked in response - Does this apply to large individual memorial monument crosses long standing in publicly maintained cemetaries? (See pages 16-17, and 38 of the Petition). If not, what distinction is drawn as to a memorial monument cross erected originally as part of a private memorial park dedicated to a single person 67 years ago created with private funds, and four years later donated to the County in trust? Based on the reasons set forth in his Petition,

Petitioner believes, that he has constitutional standing to intervene to make such arguments that the County simply has not made and will not make!

This conclusionary argument by Respondent is particularly focused on here because it falls in the same category as contended by the ACLU below that Petitioner has no constitutional right to require the cross to be maintained on public property, which was picked up in the district court's decision rejecting intervention on constitutional grounds.[4/] As addressed in the Petition, the issue here is the constitutional right <u>to be heard</u> on whether or not the state or federal constitutions mandate removal of this particular memorial cross under the

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4/ See Petition, P.39.

unique circumstances of how it came to be and continues to exist. Petitioner seeks to be heard on the "accommodation" and "anti-hostility" requirements of the Establishment Clause as extolled in Lynch v. Donnelly, 465 U.S. 68 (1983) [See Petition at PP 34-40]. He seeks to counterbalance the strict separation bias of the ACLU -- which the County has not done and cannot do, for fear that by even making the argument the County might be accused of supporting a specific religion in violation of the state and federal constitutions.

CONCLUSION

The motivation and constitutional perspective of Petitioner, as a Christian and long time resident user of the memorial park, has already been

unqualifiably demonstrated as materially different than the parties. The County cannot, will not, and has not adequately represented that perspective -- not only as to the "accommodation/hostility" constitutional issue but in several other particulars, as set out in the Petition and this Reply. Petitioner urges the Court to issue its writ so that this matter of the Constitutional right to intervene in the Helix case may be heard.

ARLINGTON RAY ROBBINS
Attorney, in pro se

September 11, 1992

File Date:
June 23, 1992

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55086

JAMES ELLIS,
Plaintiff-Appellee,

-and-

THE CITY OF LA MESA, et al.,
Defendants-Appellants,

No. 92-55087

PHILIP PAULSON, HOWARD T. KREISNER
& SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs-Appellees,

-and-

THE CITY OF SAN DIEGO,
Defendant-Appellant,

No. 92-55093

JOHN MURPHY,
Plaintiff-Appellee,

-and-

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO, Defendants-Appellants,

-and-

ARLINGTON RAY ROBBINS, Intervenor-Appellant.

Before: TANG, SCHROEDER and BEEZER, Circuit Judges

ORDER

Submission of these consolidated cases is withdrawn. Four parties are to file supplemental briefs.

The City of San Diego, as appellant in cause No. 92-55087, is requested to address the following issues:

(1) Whether the interests of the Soledad Memorial Association have been adequately considered by the district court.

(2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether the interests in real estate supporting the cross can be severed, and if so, will the conveyance of such land by a municipal corporation to private parties violate California statutory or constitutional law.

(4) Whether disputed facts remain requiring a trial.

The County of San Diego, as appellant in cause No. 92-55093, is requested to address the following issues:

(1) Whether the interests of the grantor's heirs have been adequately considered by the district court.

(2) Whether title to the land supporting the cross has been conveyed and, if so, whether this appeal is moot.

(3) Whether, under the facts of this case, conveyance to private parties of all or part of dedicated park land held in trust violates California trust, statutory or constitutional law.

(4) Whether, under the facts of this case, appointment of a successor, non-governmental trustee would be a feasible remedy.

(5) Whether disputed facts remain requiring a trial.

The briefs of the City of San Diego and the County of San Diego shall not exceed 15 pages each. These briefs shall be served and filed on or before 14 days from the date that this order is filed. The plaintiffs-appellees in the two causes each are requested to file an answering brief, which shall not exceed 15 pages. These briefs shall be served and filed on or before 28 days from the

date that this order is filed. Further briefs from other parties or from amicus curiae are not requested and the clerk of this court shall not file such briefs.